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IN THE

Supreme Court of the United States

October Term, 958

No. 472

JOSEPH W. BOWLEY,

Petitioner,

vs.

NEW JERSEY TURNPIKE AUTHORITY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

JAMES M. DAVIS, JR.
Attorney for Petitioner
110 High Street
Mount Holly, N. J.

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SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Joseph W. Bowley, of the City and County of Burlington, in the State of New Jersey, respectfully shows:

A.

That he respectfully seeks a writ of certiorari to the Supreme Court of New Jersey which entered a judgment on the opinion of Mr. Chief Justice Weintraub, a copy of which is appended hereto and which is reported in 27 N. J. 549. (Advance Sheet No. 31 of August 15, 1958) and 143 A. 2nd 558 (Advance Sheet No. 3 of August 23rd, 1958).

B.

The New Jersey Turnpike Authority is a body corporate established in the New Jersey State Highway Department. It is an instrumentality exercising public and essential governmental functions of the State of New Jersey. N. J. P. L. 1948 c. 454, p. 1858, Paragraph 3 as amended by N. J. P. L. 1952 c. 35 p. 125, Paragraph 1; R. S. 27:23-3; N. J. S. A. 27:23-3. It was authorized to build and operate turnpike projects and to exercise the power of eminent domain in the acquisition of any land or other property reasonably necessary for any turnpike project. N. J. P. L. 1948 c. 454, p. 1860, Paragraph 5 as amended by N. J. P. L. 1950 c. 1, p. 14, Paragraph 5; R. S. 27:23-5 (j); N. J. S. A. 27:23-5 (j). It built and operates the New Jersey Turnpike which extends from Deep Water in the County of Salem in a northeasterly direction to a point near the George Washington Bridge in the

County of Bergen. After the building of the original turnpike, it determined to build a connection or branch from the original turnpike to the New Jersey-Pennsylvania State Line in the middle of the Delaware River, all within the County of Burlington, for the purpose of establishing a physical connection with the easterly terminus of the Pennsylvania Turnpike. The route selected and determined upon by it, carried the turnpike through lands owned by the Petitioner. There was also taken from the Petitioner a tract of land for the toll plaza, and still another tract for an access road to the toll plaza from an existing public highway.

At the time of the taking on September 19, 1955, there existed a written contract between the Petitioner and one T. P. Morgan, which had been entered into on April 10, 1953, wherein the Petitioner agreed to sell his tract of land and Morgan agreed to purchase the same at $5,000 per acre if the Petitioner could assemble other lands to make a contiguous tract of 400 acres. The construction of the turnpike physically severed Bowley's land from other lands which he had and from the only other lands available for an assemblage which thereby made his contract of sale impossible of fulfillment.

The Petitioner and Respondent were unable to agree on the price to be paid to the Petitioner for that part of his land which had been taken and for the severance damage to the remainder. Proceedings were therefore had pursuant to the statute before three Commissioners appointed for the purpose of determining his damage, and they made an award. Petitioner was dissatisfied with the award and took an appeal to the Superior Court of New Jersey, as the

statute enabled him to do. N. J. P. L. 1953 c. 20, p. 365, Paragraph 25; R. S. 20:1-16; N. J. S. A. 20:1-16 (Pocket Parts). In that proceeding he was entitled to, and in fact had, a trial by jury. N. J. P. L. 1953 c. 20, p. 366, Paragraph 29; R. S. 20:1-20; N. J. S. A. 20:1-20 (Pocket Parts).

At the trial before the Superior Court of New Jersey the Petitioner sought to introduce in evidence for the consideration of the jury the written contract which he had with Mr. Morgan, urging that if the contract were not admitted in evidence, the action of the trial court would constitute an impairment of the obligations of this contract in violation of the Constitution of the United States. The court excluded the contract and all testimony concerning the probability of its performance from the jury. The jury returned a verdict for $216,143, which was predicated exactly upon the testimony of the two expert witnesses for the Turnpike Authority that the value of the land taken was 3,000 per acre, and that the damage to the remainder by reason of the severance was at the rate of $500 per acre.

An appeal was taken from the judgment of the Superior Court to the Supreme Court of New Jersey, in which the failure of the trial Judge to admit the contract of sale in evidence was complained of, and which action, it was contended, costituted in the alternative a taking of the Petitioner's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, or the impairment of the obligations of the Petitioner's contract in violation of Section 10, Article I of the Constitution of the United States.

The jurisdiction of this Court is invoked on the theory that the failure of the trial Judge to permit the jury to consider the value of the Petitioner's land with knowledge of the terms of the contract of sale which he had, constituted an impairment of the obligations of his contract, or in the alternative the taking of his property without due process of law, both in violation of the Constitution of the United States, and that the affirmance of that ruling and the judgment predicated upon it by the Supreme Court of New Jersey, also constitutes a denial to the Petitioner of the very same constitutional rights.

I. The date and time of the entry of the judgment of the Supreme Court of New Jersey, sought to be reviewed, is June 27th, 1952.

II. No order respecting a rehearing has been sought or allowed. An order was entered herein by Mr. Justice Brennan on Sept. 25th, 1958, which extended to and including Oct. 25th, 1958, the time within which a petition for a writ of certiorari might be filed herein.

III. The statutory provision believed to confer on this court jurisdicion to review the judgment in question by writ of certiorari is the Act of June 25th, 1948, c. 646, 62 Stat. 929; 28 United States Code 1257 (3); 28 U.S.C.A. 1257 (3).

C.

The question presented for review is, in an action to determine what damages shall be paid to a property owner for the taking in condemnation of his property, and where the land taken in condemna-

tion is subject to a pre-existing contract of sale at a specified price, which contract is conditioned upon the condemnee's acquisition and sale of other lands for the purpose of creating a tract having a large acreage, is the action of the trial court in excluding that contract from the consideration of the triers of the facts an impairment of the obligations of that contract and in violation of Section 10, Article I of the Constitution of the United States, or in the alternative a deprivation of the condemnee's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

D.

The constitutional provisions which the case involves are as follows:

Article I, Section 10; Paragraph 1:

"No State shall enter into any Treaty, Alliance, or Confederation, grant Letters of Marque and Reprisal; coin Money, emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainer, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

Amendment XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

E.

STATEMENT OF THE CASE

On April 10th, 1953, the Petitioner as seller and T. P. Morgan as buyer entered into a written contract for the sale and purchase of a tract of land then owned by the seller. The lands which the seller then owned consisted of approximately 204 acres. The agreement further provided that the seller would sell to the buyer "other lands situate in Florence and Burlington Townships which are to be acquired by said Bowley, to make up 400 acres of land to the said T. P. Morgan for the price of FIVE THOUSAND DOLLARS per acre; the lands which are to make up the 400 acre assemblage may be a part of the lands of John D. Marter lands and Helen, his wife, and the land or part of lands of the Sutton Estate, and the land or part of lands of the Hayes Estate; some of the above lands are under acquisition and others which are to be acquired. The said Bowley must deliver to the said T. P. Morgan a minimum of 400 acres, bounded by Schuyler Ferry Road, the River Road, and the properties of the Florence Pipe Foundry and Cedar Lane."

The same contract contained a further provision reading as follows:

"Settlement is to take place at The Office of the West Jersey Title Company, Camden, New Jersey, sixty days after the official declaration of the permanent alignment of the Pennsylvania extension of the New Jersey Turnpike has been declared. Full payment of cash to be received at the time of settlement. It is further agreed between Joseph W. Bowley and

T. P. Morgan in the event that the said Joseph W. Bowley cannot deliver 400 acres of the aforesaid property described above because of the alignment of the New Jersey Turnpike extension, the said Joseph Bowley will not be penalized or the said T. P. Morgan will not be bound by this agreement, and the said Joseph Bowley will return to the said T. P. Morgan the $1,000 paid in advance and will return any other moneys advanced by T. P. Morgan to Joseph W. Bowley." At the time this contract was executed, there was wide public discussion of the fact that a connection between the Pennsylvania and New Jersey Turnpikes would be built somewhere in the neighborhood of Bordentown or Florence in Burlington County, New Jersey, but it was not known what the precise location of the Turnpike would be.

On August 5th, 1953, Petitioner acquired the so-called Marter farm, having an acreage of approximately 45 acres. Lying between and connecting the Bowley property and the Marter farm was the Sutton Estate farm referred to in the agreement, which contained slightly more than 146 acres. The Hayes Estate with 57.91 acres and the Scott property with 10.24 acres filled in the River Road frontage between the Florence Pipe Foundry Co. and Schuyler's Ferry Road. Here was a total of 463.55 acres. In addition, Mr. and Mrs. Bauer owned a property adjoining the Bowley property on the north side which contained 44 acres. So far as the Hayes property was concerned, Bowley had made a deposit thereon of $5,000 and negotiations had proceeded to the point of a contract being drawn. Negotiations for the Scott

property proceeded to the point of a contract being drawn. Bowley had had conversations with Ernest Sutton for the purchase of the property of the Sutton Estate. Mr. Bauer appeared and testified that he had had conversations with Bowley about the sale of his property and that he was willing to sell. Bowley also produced an assignment of the Sutton Estate heirs of their right to acquire in front of their property from the State of New Jersey the riparian lands along the Delaware River. There was, therefore, a prima facie showing that Bowley was working to effect the assemblage, and that he was making progress in that direction. These proofs were heard by the trial judge alone as bearing on the admissibility of the contract of sale.

On Sept. 19, 1955, the Respondent took a portion of Bowley's property for the new turnpike right of way. It also took the center portion of the Hayes property. The laying out of the turnpike extension left the greater part of the Bowley property, the Bauer property, small parts of the Hayes and Sutton properties, and the larger part of the Scott property on the north side of the turnpike right of way. It effectively cut off any opportunity which Bowley had to assemble 400 acres on the north side of the turnpike because except for the properties hereinbefore mentioned, the Florence Pipe Foundry property is on the north side and is unavailable for any industrial real estate assemblage. The greater part of the Sutton property, all of the Marter property, and all of the Sutton rights to acquire riparian lands were left on the south side of the turnpike and, of course, the presence of the turnpike prevents them

from having any physical connection with the Scott, Hayes, Bowley, or Bauer properties on the north, and, therefore, prevented Bowley from being able to make an assemblage of 400 acres including his own 204 acres and, therefore, deprived him of the ability to perform his contract of sale and thereby impaired the obligation of Mr. Morgan under that contract to pay $5,000 per acre therefor.

Just a short distance to the south of the turnpike the Pennsylvania Railroad Company had succeeded in effecting an assemblage of several hundred acres of land, a part of which it sold to the National Gypsum Company for $3,500 an acre. It was, therefore, amply demonstrated that land in this area could easily be devoted to the sale in large tracts for industrial purposes.

At the jury trial where the damage of Bowley was to be assessed, the court refused to permit the contract of sale to be submitted to the jury and refused to permit the jury to hear the testimony offered by Bowley and his witnesses as to the efforts which he had made and the progress which he had realized in attempting to create an assemblage. The court, therefore, effectively excluded from the jury's consideration all possibility that the jury might consider in light of all of the facts and circumstances the anhanced value of the Bowley land, enhanced as it was by the existence of the contract which he had and the probability that he could perform it.

E.

The federal question was raised in the first instance in the offer of the contract of sale in evidence

and in the argument of counsel for the Petitioner in support of its being admitted. The offer of the agreement in evidence was renewed. At Page 414a of the Appendix, Line 14, the agreement was offered in evidence and objected to by counsel for the Respondent as follows:

> "Mr. Davis: You may step down. I would like to offer the agreement in evidence, your Honor.
>
> Mr. Parker: I object to it for the reasons that I stated yesterday, and for further reasons by the very terms of the agreement which shows that - - - "

Then followed the colloquy and argument of counsel during which counsel for the Petitioner stated as follows at D414a Line 39:

> "Mr. Davis: May it please your Honor, the Constitution of the United States provides that no State shall impair the obligation of any contract. You have here before you a contract entered into by Dr. Bowley with Mr. Morgan in April, 1953. It is contended here that the action of the Turnpike, which is an arm of the State of New Jersey, in condemning Dr. Bowley's property, it interfered with this contract, and interfered to the extent it impaired the obligation of the buyer to buy. That is a constitutional right of this Defendant to have his contractual right, under this instrument, considered by your Honor and by this jury."

The court then announced his ruling at D 665a Bowley could be able to fulfill his contract of sale and ruled that this testimony would be received out of the hearing of the jury (D 587a Line 17).

The court then announced his ruling at L 665a Line 26 to D 667a Line 24, at which point the offer of Exhibit D-1 in evidence was rejected. The court's ruling was announced orally and in the following manner:

> "The Court: Gentlemen, this question has given me considerable concern, because I am well aware that this document, if admissible, would be a very important document to the defendant, because it indicates, among other things, that if it were consummated, not to consider the costs of land to be acquired, that Dr. Bowley would have made a gross profit that would be very, very substantial, in view of the fact that at the time of making this agreement he held 204 acres of land, more or less. However, I do not view this proffer of evidence in the light indicated by Mr. Davis. I think that here we have a special proceeding. We have a proceeding to determine the fair compensation to be paid by the New Jersey Turnpike Authority to Joseph W. Bowley and others for the taking of 45 acres of land, more or less, on September 19, 1955, for the uses of the New Jersey Turnpike Authority in its extension to the Pennsylvania Turnpike. I think the Court, in deciding whether or not this Exhibit is admissible, has to consider these factors, namely, was there reasonable probabil-

ity of a consummation of this agreement, and could it have been reasonably anticipated that it would have been fulfilled in the near future.

"After listening to all of the evidence, and aside from the circumstances surrounding its execution and the circumstances surrounding the payment of the down payment and return of it, it would appear from all the evidence, looking at it in its most favorable light, that at the time of the execution, even the parties had some reservation as to their ability to fulfill the contract, as indicated by the language used in Article 2 of the agreement, namely, that settlement is to take place at the office of the West Jersey Title Company, Camden, New Jersey, 60 days after the official declaration of the permanent alignment of the Pennsylvania extension of the New Jersey Turnpike has been declared, and, full payment in cash to be received, etc., and that in the event that Mr. Bowley cannot deliver 400 acres of the aforesaid property described above, because of the alignment of the New Jersey Turnpike extension, the said Joseph W. Bowley will not be penalized, and the said T. P. Morgan will not be bound by this agreement, and the said Joseph Bowley will return to the said T. P. Morgan, the $1,000 paid in advance, and will return any other monies advanced by T. P. Morgan to Joseph W. Bowley. That is some of the indication of the uncertainty that existed in the minds of the parties to the agreement at the time of its execution.

"It appears further that, nothwithstanding the assiduous efforts of the seller, even down to this date, there is nothing of a credible nature to show that he was able to acquire, by actual agreement or by informal agreement, the 400 acres acquirec within the terms set out in the agreement.

"I don't think I need say more. It is the Court's opinion that this proposed agreement does not meet the test set out in the several cases dealing with the question of admissibility of evidence, having to do with proposals and plans for land being condemned by a sovereignty, in this case the New Jersey Turnpike Authority, a sovereignty of the state of New Jersey, and those cases usually hold that where the plan or proposal is conjectural or speculative in nature, the evidence of a plan or proposal is not admissible. In fact, they hold that it is error to permit such a plan or proposal to be sufficient evidence to go to the Jury. In those cases, the Court seemed to hold to the principle that before evidence of value can go to the Jury, it must be of such a nature as to be indicated for any use for which the land has a commercial value of is own, in the immediate present or in the reasonable anticipation in the near future.

"To sum up, it would appear from all the evidence, from listening to Dr. Bowley, from his explanation of how he did this, and what he proposed to do, even taking into consideration his characterization that it was a gamble, I can not help but conclude that there was not in his

mind, and, as indicated from all of the surrounding circumstances in evidence, reasonable anticipation of fullfilment of this agreement.

"For those reasons, the offer of D-1 is rejected."

"Mr. Davis: Your Honor, I assume that the practice of applying for exceptions is abolished, but I would like the record to show that the defendant does feel aggrieved by Your Honor's ruling on this question, so that he might reserve his rights to complain of it on appeal, if that becomes necessary, sir.

"The Court: Well, I think you ought to go beyond that, Mr. Davis, and have the record show now that, in addition to offering D-1, you have offered a number of supporting documents, showing attempts on the part of the defendant to fulfill the terms of the agreement set out in D-1, and, in addition, you have endeavored to have the Jury itself hear the testimony with respect to your efforts to have the Exhibit accepted in evidence, and the Court has sustained the objection, to the supporting documents, and has sustained the objection to your proposal to have the Jury hear the supporting evidence."

In the New Jersey Supreme Court the Petitioner was required by rules of court to state in his brief the questions involved. He stated the questions as follows:

"1. When an agency of the state condemns for a public purpose land which, prior to the taking by the state agency, the owner has contracted to sell in connection with other lands which he hoped to acquire, is that contract admissible in evidence at the trial of the condemnation proceeding?

2. If under the circumstances described in Question No. 1, the judge trying the condemnation proceeding takes proof out of the hearing of the jury as to the probability of the landowners being able to perform the contract and thereafter determines that the land-owner would not have in his mind any reasonable anticipation of fulfillment of the agreement and that the contract should therefore not be received in evidence, does the action of the trial judge

A. Deprive the land-owner of evidence tending to show the value of the land in light of its adaptability together with all lands to its highest and best use;

B. Deprive the land-owner of his right to trial by jury;

C. Constitute a taking of the land-owner's property without due process of law in violation of the Constitution of New Jersey and the Fourteenth Amendment to the Constitution of the United States; or

D. Constitute the impairment of the obligation of the land-owner's contract in violation of Sec-

tion 10 of Article I of the Constitution of the United States.

Although the constitutional question was clearly before the trial judge and also the Supreme Court of New Jersey, both courts rejected the Petitioner's contentions.

The Supreme Court of New Jersey dealt with the constitutional question and cited the case upon which the Petitioner placed his principal reliance in the following language, at Page 558 of 27 N. J. and. Page 563 of 143 A 2d;

> "The power of eminent domain of course is not restrained by the existence of a contract of sale and the exercise of that power does not violate the constitutional guaranty against state action impairing the obligation of contract. City of Cincinnati v. Louisville & Nashville Railroad Co., 223 U. S. 390, 32 S.Ct. 267, 56 L. Ed. 481 (1912).
> "The question, rather, is whether there is a right of compensation for the loss of the contract. A distinction has been drawn in general terms between a case in which the condemnor acquires and takes over a contract and a case in which the taking of the property frustrates the performance of a contract, compensation being allowed in the former instance and denied in the latter. 1 Orgel supra § 76, p. 330; Jahr, supra, § 114, p. 157.
>
> "The Morgan contract in no sense became part of the land. It did not further any existing enjoy-

ment or utilization of the land, nor was the land devoted to an activity which would result in the performance of the contract. Cf. City of Trenton v. Lenzner, 16 N. J. 465, 109 A. 2d 409 (1954) certiorari denied, 348 U. S. 972, 75 S. Ct. 534, 99 L. Ed. 757 (1955). The land was a farm. The contract was nothing more than a personal right of Bowley, indistinguishable from the right which a stranger to the lands would have had if Morgan had contracted with that stranger for the acquisition and sale of the acreage. Hence we fail to discern how it can be said the contract was attached to the land and condemned with it.

"Nor did Plaintiff intend to take over the Morgan contract and to appropriate to itself the benefits of that contract. It had no desire to assemble and sell lands to Morgan; its purpose was to build a turnpike extension. In fact, the contract was no longer in existence at the time of the declaration of taking, for Bowley had already terminated it by returning the deposit, and in any event the contract by its terms was then beyond performance.

"Nor was there any proof as to the value of the contract or that anyone would have paid a farthing to take over what Bowley acknowledged to be a gamble."

G.

Not applicable to this Petition.

H.

The basic rule was long ago established by this court in Boom Co. v. Patterson, 98 U.S. 403 (1878) at p. 407 and 408 in the following language of Mr. Justice Field:

> " * * * In determining the value of the land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed not merely with the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what it is worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences in life. Its capability of being made thus available gives it a market value which can be readily estimated."

More recently Mr. Justice Douglas ruled for this court in U. S. v. Powelson 319 U. S. 266 at 275, 63 S. Ct. 1047 at 1052 (1943) as follows:

> "An owner of lands sought to be condemned is entitled to their 'market value fairly determined'. U. S. v. Miller 317 U. S. 369 at 374; 63 S. Ct. 275 at 280, 87 L. Ed.—That value may reflect not only the use to which the property is presently de-

voted, but also that use to which it may be readily converted. Boom Co. v. Patterson 98 U.S. 403 24 L. Ed. 206; McCandless v. U. S. 298 U.S. 342 56 S. Ct. 764, 80 L. Ed. 1205. In that connection the value may be determined in light of the special or higher use of the land when combined with other parcels; it need not be measured merely by the use to which the land is or can be put as a separate tract. McGovern v. New York 229 U. S. 363, 33 S. Ct. 876, 57 L. Ed. 1228, 46 L.R.C., N. S., 391. But in order for that special adaptability to be considered there must be a reasonable probability of the lands in question being combined with other tracts for that purpose in the reasonably near future. Olson v. U. S. 292 U. S. 246 at 255; 54 S. Ct. 704 at 708, 78 L. Ed., 1236. In absence of such a principle, the chance of their being united for that specific use is regarded 'as too remote and speculative to have any legitimate effect upon the valuation'. McGovern v. New York supra, 229 U. S. p. 372, 33 S. Ct., p. 877, 57 L. Ed., 1228, 46 L.R.A. N. S. 391."

Mr. Justice Snow of the Supreme Court of New Hampshire stated the same rule for that Court in Emmons vs. Utilities Power Co., 83 New Hampshire 181, 141 A. 65, 58 A.L.R. 788 at 792 in the following language:

"The true rule seems to be that the enhanced market value, if any, of the plaintiff's land, due to its adaptability for valuable uses in connection with other properties, may be shown if the practicability of the combination of all of the

necessary properties upon which such availability depends was at the time of the condemnation so great as to have probably affected the public in mind, and therefore to have enhanced the price which a purchaser might be expected to give."

The State of New Jersey applies the same rule in its courts: Curry v. Waverly, etc., Railroad Co., 52 N. J. L. 381 (Court of Errors and Appeals, 1890) and State Highway Commissioners vs. National Fireproofing Corporation, 127 N. J. L. 346 at 351 (Court of Errors and Appeals, 1941).

The Supreme Court of New Jersey has recently stated the general rule for the admeasurement of the value of land in condemnation proceedings as being "the price which, in all probability, would voluntarily be agreed upon in fair negotiations between an owner willing (but not forced) to sell and a buyer willing (but not forced) to buy". City of Trenton v. Lenzner 16 N. J. 465, 109 A 2nd, 409 at 414. Certiorari denied; 348 U. S. 972, 75 S. Ct. 534, 99 L. Ed., 757.

In negotiations between a willing seller and a willing buyer, the adaptability of a parcel of land in connection with other lands for a higher and better use is a factor that would undoubtedly be given important consideration. Certainly that would be true where, as here, within a few hundred feet the Pennsylvania Railroad Company had created an assemblage of various parcels of land and had sold one large part thereof to the National Gypsum Company for $3,500 per acre. See contract of sale, Exhibit P-48 at D 719a.

The trial judge who conducted the proceedings in the Superior Court recognized this rule and permitted the Petitioner to show in whatever way he could that his land would have an adapability in connection with other lands. We do not understand counsel for the Respondent to argue against this proposition.

The next step, however, is whether the pre-existing contract of sale was evidential as tending to show the value of the land taken in condemnation when combined with other lands and adapted to the purpose of an industrial assemblage. This, the Respondent will argue and the courts below ruled, had no place in the determination of the value to be paid to the Petitioner.

If the Turnpike Authority had had to acquire the Bowley property by voluntary sale rather than by condemnation, and if it had offered to him in purchase of his land the $3,000 an acre which he was allowed for that which was taken, it would certainly have been a material consideration in the mind of the Petitioner as a proposed vendor that there already existed a contract under which he could obtain $5,000 an acre for his land if he could succeed in assembling with it a tract totaling 400 acres and it would have been a natural thing for him to have informed a prospective buyer seeking to obtain the property at a lesser price that he had such a contract. Whether or not within reasonable probability he could have succeeded in creating the assemblage of the additional acreage, is a question which might enter into the bargaining. The seller would undoubtedly consider the difficulties attendant to the

acquisition of the needed additional acreage in determining by how much he would reduce his demand below $5,000 an acre, and the purchaser would undoubtedly evaluate in his mind what the possibilities and probabilities were in determining how close to the $5,000 an acre figure he would come in making an offer.

Therefore, both the contract and the probabilities or lack of probabilities of the Petitioner's being able to acquire the need acreage were factors which would enter into the bargaining between a willing seller and a willing buyer and they should, therefore, be factors to be considered in determining what the value of the land was that was being acquired by the sovereign through the eminent domain process.

We think that the learned Chief Justice of the Supreme Court of New Jersey was mistaken when he said:

> "The Morgan contract in no sense became part of the land. It did not further any existing enjoyment or utilization of the land, nor was the land devoted to an activity which would result in the performance of the contract."

The authorities seem to be uniform that the availability of land for a higher use when coupled with other lands is a legitimate factor to be considered in determining the value of the land.

If it is true that the availability of land together with other lands for a higher and better use together than they could be put to severally, is a factor in the

determination of land values, and if it is true, as Mr. Justice Field said in Boom Company v. Patterson, that "Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it and make it subserve the necessities or conveniences in life."

The fact that the Petitioner had contracted to try to put it together with other lands, the whole assemblage of which could be put to a higher and better use, and the fact that the purchaser had agreed to pay to the Petitioner his price or reward of $5,000 for each acre so assembled, is strong evidence that the contract would further the existing enjoyment or utilization of the land which was taken and that which was damaged, and also of the fact that the land was being devoted to an activity which would result in the performance of the contract.

We also believe that the learned Chief Justice of the Supreme Court of New Jersey was also mistaken when he said that

> "The contract was nothing more than a personal right of Bowley, indistinguishable from the right which a stranger to the lands would have had if Morgan had contracted with that stranger for the acquisition and sale of the acreage. Hence we fail to discern how it can be said the contract was attached to the land and condemned with it."

The contract was more than a mere personal right of the Petitioner indistinguishable from the right of

a stranger to the lands with whom Morgan may have contracted for the acquisition and sale of the acreage. Insofar as what the Turnpike took, the contract was concerned with land which Bowley already owned and it vested in the purchaser an equitable estate subject to Bowley's being able to complete his assemblage and make title to the purchaser and subject to the purchaser's payment of the balance of the purchase price. In the case of a stranger to the title, he would have lost nothing by the condemnation because he had no title or right in the land at the time of the taking.

Perhaps the language of counsel for the Petitioner in his brief and oral argument to the New Jersey Supreme Court was awkward, but he did argue there and he argues here that it is only when the sovereign recognizes the existence of the contract of sale, when he condemns the land, and permits the evaluators to take into account what added value that contract gave to the land, if any, that he has not either been deprived of his property without due process of law on the one hand, or had the purchaser's obligation under that contract impaired.

This principle was decided by this Court in City of Cincinnati vs. Louisville and Nashville Railroad Co., 223 U.S. 390 (1911). In that case the Railroad Company instituted in a court of the State of Ohio a suit to condemn a right of way for an elevated railroad track across the public landing at Cincinnati. The City of Cincinnati filed a bill in equity to enjoin the Railroad Company from constructing the elevated railroad across the public landing and to restrain the prosecution of the Railroad's condemnation suit. The City contended that an Act of the

Legislature of Ohio of May 9th, 1908, under which the Railroad was proceeding in its condemnation proceeding was unconstitutional in that it impaired the obligation of a contract. The contract, the obligations of which were alleged to have been impaired, was the Ordinance of 1787 creating a government for the Northwest Territory embracing the territory which later became the State of Ohio. It was the contention of the City that the only power of condemnation was that contained in the Ordinance of 1787, and that it could not be supplanted by a later statutory enactment of the State of Ohio without an impairment of the obligations of a contract, it being argued that the Ordinance of 1787 was a compact between the original States and the people of the States in the said Territory and was unalterable except by common consent.

This court declared that the power of eminent domain is an inherent power of State Government without which it could not well perform its great functions, and that the constitutional inhibition upon any state law impairing the obligation of contracts is not a limitation upon the power of eminent domain. This court also stated that the obligation of a contract is not impaired when it is appropriated to a public use and compensation is made therefor. We agree with these propositions. We do not contend that the fact that the Petitioner had a contract for the sale of his property in any wise prevented the State or its agencies from the exercise of the power of eminent domain.

But this court also pointed out that when a contract is appropriated to a public use and compensation made therefor, the exercise of the power of emi-

nent domain neither challenges the validity of the contract nor impairs its obligation. Both the validity of the contract and the obligation of the contract are recognized, for it is appropriated as an existing enforceable contract. It is a taking of the contract and not an impairment of its obligation. This court further declared that if compensation be made, no constitutional right has been violated. With all of this we agree.

On the other hand this court also declared in the same case that the power of eminent domain residing in the States is untouched by any of the provisions of the Federal Constitution, provided there be due process of law, that is, a law authorizing it, and provision made for compensation. It is, therefore, clear that the exercise of the power of eminent domain does not impair the obligations of a contract when the validity of the obligations of the contract are recognized and compensated for, and it is equally clear that the exercise of the power of eminent domain is subject to the necessity for due process of law including the right to be fairly compensated.

In the City of Cincinnati v. Louisville and Nashville Railroad Company the land over which the elevated railroad was to be constructed was included in the grant by proprietors of land upon which the City of Cincinnati was originally laid out and was set apart "as a common for the use and benefit of the town forever." As to this dedication this court said at Page 399:

> "That the dedication in 1789, and acceptance by the then Town of Cincinnati constituted a con-

tract with the dedicators obligatory upon the Town and its successors, the City of Cincinnati."

In that case the action of the Railroad in seeking to condemn this land recognized a contract of dedication and sought the use of the court's machinery to determmine appropriate compensation.

Within the framework of the general principles enunciated by this court, that the taking recognized both the validity and the obligations of a contract, there was no impairment of the obligation of a contract. In the case at hand when the Petitioner came forward with his contract the court recognized neither the validity nor the obligation thereof. It excluded it from all consideration of the jury which had been impanelled to determine the value and it was required by the action of the trial judge to determine the value without any reference to the contract. What happened to this contract and the obligations created thereby in light of the taking of the Petitioner's land by the Respondent and in light of the action of the trial judge, affirmed as it has been by the highest court of the State? The contract was put aside by the trial judge. It could not be further operative because the exercise of the power of eminent domain by the Respondent had at one and the same time wiped out a part of the subject matter of this contract and prevented its ultimate fulfillment by the Petitioner.

We do not wish to be understood as arguing that the Respondent should have condemned the contract or provided the Petitioner any compensation for his contract. We do argue, however, that the existence of an obligation under that contract on

the part of the purchaser to pay $5,000 an acre for the land taken by the Respondent and for the land damaged by the Respondent as part of a tract of 400 acres to be assembled, affected the value of the Petitioner's land, and that, when the judicial proceeding was conducted, the purpose of which was to determine the value of that land, and the triers of the fact were not permitted to determine to what extent the value of the Petitioner's land had been enhanced by the existence of that contract and by what the Petitioner had done in fulfillment of the contract, the judicial action amounted to the passage of a law which impaired the obligations of the Petitioner's contract. Or in the alternative since no compensation was provided for the value which that contract added to the Petitioner's land, there was a taking, pro tanto, of his property without due process of law.

The Supreme Court of New Jersey in its Opinion states that "the Respondent did not intend to take over the Morgan contract or to appropriate to itself the benefits thereof." The fact is, that irrespective of the intention of he Respondent, the effect of the taking without compensating the Petitioner for the value which the contract added to his land amounted to a taking of his contract. The Supreme Court of New Jersey attempts to excuse the action of the Turnpike Authority and of the trial judge in the particulars complained of by saying that before the declaration of taking, Bowley had terminated his contract by returning the deposit. While this may be so, it was not done until it was obvious to the eye that the turnpike extension was going to go through his property and that the filing of a declaration of taking was only a formal matter.

The Supreme Court of New Jersey further argues that an owner of land may not contract for the sale thereof with knowledge of a proposed public improvement upon the express stipulation that performance will be excused if the lands are condemned, and then assert that the advent of the improvement constitutes an actual interference with it.

Again stating that the Supreme Court of New Jersey fell into error because what we are talking about is the added value to the Plaintiff's land by reason of the opportunity to create an assemblage of land and a promised price for that land if the assemblage was successfully effected, and the fact that the making of the improvement took land which would have had in all reasonable probability an added value if the improvement had not been made, certainly the right and opportunity of the land owner to make his property as valuable to himself as he possibly can, is a proper right which he has and one with which no government may interfere without compensating him fairly therefor. The argument of the Supreme Court of New Jersey amounts to a contention that because the Petitioner knew that the turnpike extension was being planned, he had no right to go forward with his plans for enhancing the value of his property. Certainly this cannot be so.

I.

There is appended hereto a copy of the Opinion of the Supreme Court of New Jersey.

J.

There is appended hereto a copy of the Judgment of the Supreme Court of New Jersey.

Petitioner respectfully prays for a writ of certiorari to issue to review the Judgment of the Supreme Court of New Jersey complained of, and he will ever pray.

JAMES M. DAVIS, JR.
Attorney of Petitioner
110 High Street
Mount Holly, N. J.